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No.

IN THE

Supreme Court of the United States

KATHLEEN EVANS, as Conservator of
JESSICA EVANS, a protected person,

Petitioner,

v.

LEDERLE LABORATORIES, LINK CLINIC
and O. SHARMA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the National Childhood Vaccine Injury Act, ("Act") 42 U.S.C. § 300aa-1, *et seq.*, preempt state rules of procedure which operate to prevent a plaintiff electing to reject an award under 42 U.S.C. § 300aa-11(a)(2)(A)(i) and 300aa-21(a) from recommencing civil proceedings.

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Petitioner, Kathleen Evans, as Conservator of Jessica Evans, a protected person, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit rendered in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Evans v. Lederle Laboratories, et al.*,167 F.3d 1106 (1999) (App. A at 1a). The Order of the United States District Court for the Central District of Illinois, Peoria Division, in *Evans v. Lederle Laboratories, et al.*, is published at 904 F. Supp. 857 (1995) (App. B at 18a).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its Opinion on February 3, 1999. A petition for rehearing was timely filed on February 19, 1999. The petition was denied on April 30, 1999. (App. D at 30a).

STATUTORY PROVISIONS INVOLVED

This case involves the National Childhood Vaccine Injury Act, 42 USC, § 300aa-1, *et seq*. and a "one refiling rule" that is a judicially created doctrine engrafted onto Illinois rule of procedure 735 ILCS 5/13-217.

From a policy standpoint the entire National Childhood Vaccine Injury Act is relevant, however, the specific procedural provisions of the Act germane to this petition are as follows:

1. **Section 300aa-11(a)(5)(A) and (5)(B)**

(5)(A) A plaintiff who on the effective date of this subpart has pending a civil action for damages for a vaccine-related injury or death may, at any time within 2 years after the effective date of this subpart or before judgment, whichever occurs first, petition to have such action dismissed without prejudice or costs and file a petition under subsection (b) of this section for such injury or death.

(5)(B) If a plaintiff has pending a civil action for damages for a vaccine-related injury or death, such person may not file a petition under subsection (b) of this section for such injury or death.

2. **Section 300aa-16(c)**

(c) State Limitations of actions

If a petition is filed under section 300aa-11 of this title for a vaccine-related injury or death, limitations of actions under State law shall be stayed with respect to a civil action brought for such injury or death for the period beginning on the date the petition is filed and ending on the date (1) an election is made under section 300aa21(a) of this title to file the civil action, (2) an election is made under section 300aa-21(b) of this title to withdraw the petition, or (3) the petition is considered withdrawn under section 300aa-21(b) of this title.

3. **Section 300aa-21(c)**

(c) Limitations of actions

A civil action for damages arising from a vaccine-related injury or death for which a petition was filed under section 300aa-11 of this title shall, except as provided in section 300aa-16(b) of this title, be brought within the period prescribed by limitations of actions under State law applicable to such civil action.

4. **Section 300aa-22(e)**

(e) Preemption

No State may establish or enforce a law which prohibits an individual from bringing a civil action against a vaccine manufacturer for damages for a vaccine-related injury or death if such civil action is not barred by this part.

The Illinois statute involved is as follows:

1. **735 ILCS 5/13-217**

Reversal or dismissal. In actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, if judgment is entered for the plaintiff but reversed on appeal, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or the action is voluntarily dismissed for

want of prosecution, or the action is dismissed by the United States District Court for lack of jurisdiction, then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or entered against the plaintiff, or after the action is voluntarily dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction.

STATEMENT OF THE CASE

The question presented in this petition is whether the National Childhood Vaccine Injury Act preempts state statutes of limitation that prevent a person from bringing a post-election civil action for vaccine-related injuries. The Illinois judicially-created "one refiling rule" in this instance was used to deprive petitioner from bringing a civil action after she elected to reject an award under the National Childhood Vaccine Injury Act. The opinion below is contrary to the plain language contained in the Act and it undermines the purpose the Act was intended to serve.

A. Overview Of The National Childhood Vaccine Injury Act

The National Childhood Vaccine Injury Act was passed by Congress on November 14, 1986. As stated in the opinion below, the Act was designed to provide "a no-fault compensation system for individuals harmed by childhood

vaccines." The Act established a compensation fund financed by a tax on vaccines. Persons alleging that they had sustained injuries from a vaccine could seek compensation from the fund by filing a petition in the United States Claims Court naming the Secretary of Health and Human Services as respondent.[1] Compensation was awarded if an injury was proven to be causally linked to the administration of a vaccine.

In creating the Act Congress recognized and identified three distinct groups of injured persons. First, there were persons who alleged injury from vaccines administered prior to the Act and who, prior to the Act, had commenced civil actions. Second, there were persons who alleged injury from vaccines administered prior to the Act but who, as of the time the Act was passed, had not yet commenced civil actions. Third, there were persons who alleged injury from vaccines administered after the Act was passed.

Under the Act persons in the first group were encouraged to dismiss their civil actions *without prejudice* and proceed with a petition in the United States Claims Court. If they were dissatisfied with the remedy afforded in the United States Claims Court they could then elect not to accept the decision and they could resume their civil actions. As to the second group, they could either commence a civil action or seek a remedy under the Act by filing a petition in the United States Claims Court. Persons in the second group who chose to first commence a civil action could not thereafter avail themselves of a remedy under the Act. Finally, as to persons in the third group, under the Act they could not commence civil actions without first pursuing a remedy in the United States Claims Court. Persons in group three could still commence civil actions but only after they had exhausted the procedures in the United States Claims Court.

1. Now called the United States Court of Federal Claims.

Petitioner fell into the first group in that her DPT vaccine was administered prior to the Act and a civil action had been commenced prior to the Act. To file a claim under the Act, petitioner was required to dismiss her pending civil action. 42 U.S.C. § 300aa-11(a)(5)(A).

B. Background and Proceedings Below

1. *The Parties*

Jessica Evans is profoundly disabled as a result of an encephalopathy. There is evidence that she experienced an adverse reaction upon administration of her initial DPT vaccination. The vaccine was manufactured by Lederle Laboratories and administered by Dr. O. Sharma at the Link Clinic.

2. *State Court Proceedings*

By other counsel, a malpractice suit was initially filed on August 14, 1985 on behalf of Jessica Evans in the Circuit Court of Cook County, Illinois. The suit named Dr. O. Sharma and the Link Clinic and various other defendants. Lederle Laboratories was not a defendant nor was any claim made for a vaccine-related injury. The suit was transferred to the Circuit Court of Coles County, Illinois. Thereafter petitioner's present counsel became involved. The case was voluntarily dismissed on July 14, 1988.

3. *Federal District Court Proceedings*

A new suit (Cause No. 88-3191) naming the present defendants Dr. O. Sharma, the Link Clinic, and Lederle Laboratories was timely filed on June 22, 1988, in the United

States District Court for the Central District of Illinois. Jurisdiction was based on diversity. 28 U.S.C. § 1332. The new suit focused on evidence that suggested that Jessica Evans' encephalopathy was caused by the DPT vaccine. This possibility had been uncovered during the course of pretrial proceedings in the initial state court case.

Cause No. 88-3191 was assigned to Judge Richard Mills. On August 24, 1990, plaintiff filed a "Motion to Dismiss *without prejudice* so as to allow proceeding under the National Childhood Vaccine Injury Act." (App. C at 27a). The motion was allowed on August 28, 1990.

Lederle had encouraged the voluntary dismissal both informally, through correspondence with petitioner's counsel, and also in pleadings. At all times relevant Lederle encouraged petitioner to seek a remedy under the National Childhood Vaccine Injury Act.

Dr. Sharma and Link Clinic objected to the voluntary dismissal. They sought to have the case dismissed *with prejudice* or alternatively that they be awarded their attorneys' fees and costs. The court did not grant either request and instead granted a voluntary dismissal *without prejudice.*

None of the defendants appealed the voluntary dismissal *without prejudice* granted by the court.

4. *Proceedings Pursuant to the National Childhood Vaccine Injury Act*

After having satisfied the statutory prerequisite of dismissing her civil action, petitioner proceeded to timely

file a petition in the United States Claims Court pursuant to the National Childhood Vaccine Injury Act. As was required, the Secretary of Health and Human Services was the sole respondent. Approximately 4-1/2 years later the petitioner and the respondent entered into a joint stipulation to dismiss the matter. This was a process permitted under the Act. 42 U.S.C. § 300aa-17. The stipulation was allowed. The petition was dismissed on January 31, 1995.

5. *Recommencing Civil Proceedings in Federal District Court*

Thereafter on February 28, 1995, the petitioner timely filed the instant case which, rather than being assigned to Judge Mills, was assigned instead to Judge Michael Mihm. On October 31, 1995 Link Clinic and Dr. O. Sharma were dismissed by Judge Mihm after they filed a Motion to Dismiss asserting that petitioner's cause of action was barred by 735 ILCS 5/13-217. Thereafter on January 28, 1998 Judge Mihm granted a judgment on the pleadings in favor of Lederle. The sole basis for dismissal raised by Lederle was 735 ILCS 5/13-217.

On appeal a panel of the Seventh Circuit Court of Appeals affirmed both of Judge Mihm's dismissal orders holding that the "one refiling rule" judicially engrafted onto 735 ILCS 5/13-217 was not preempted by the National Childhood Vaccine Injury Act.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW IS CONTRARY TO THE EXPRESS PROVISIONS OF THE NATIONAL CHILDHOOD VACCINE INJURY ACT.

The petition for writ of certiorari should be granted because the opinion below disregards the plain language of the National Childhood Vaccine Injury Act. The opinion below contravenes the plain language of the Act by applying the Illinois judicially-created "one refiling rule" engrafted to 735 ILCS 5/13-217 to extinguish what would otherwise be an entirely proper cause of action.

This Court has stated that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy. *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) *quoting Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986) *quoting Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956) *in turn quoting United States v. Heirs of Boisdore*, 8 How. 113, 122 (1949). Courts are instructed to "give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-539 (1955). Further, "in construing a statute, courts should attempt not to interpret a provision such that it renders other provisions of the same statute inconsistent, meaningless or superfluous." *Wells v. Secretary of the Department of Health and Human Services*, 28 Fed. Cl. 647, 660 (1993) *quoting Boise Cascade Corp. v. United States E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991). As this Court has so eloquently stated:

> [w]ords are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all their aggregate take their purport from the setting in which they are used. *King v. Saint Vincent's Hosp.*, 502 U.S. 215 __ (1991) (Souter, J.) *quoting NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.)

In reviewing the National Childhood Vaccine Injury Act, each section must be construed "in connection with all the sections so as to produce a harmonious whole." *Wells v. Secretary of the Department of Health and Human Services*, 28 Fed. Cl. 647, 661 (1993). The relevant sections of the Act read as a whole support a finding that the Act preempts state statutes of limitations that prevent a petitioner from commencing a post-election civil action to recover for a vaccine related injury.

Under 42 U.S.C. § 300aa-11(a)(5)(A) in order to file a vaccine claim a prospective claimant is required to dismiss a pending civil action. The dismissal is to be *without prejudice*. (emphasis added). The motion to dismiss filed by petitioner in Cause No. 88-319, which was granted by the trial court, specifically referenced that the dismissal was being sought *without prejudice* pursuant to 42 U.S.C. § 300aa-1 *et seq*. The *without prejudice* nature of the dismissal was fully ratified by the trial court. (App. C at 29a). Defendants Sharma and Link Clinic contested the *without prejudice* aspect of the dismissal but thereafter took no appeal. Defendant Lederle did not contest the dismissal at all and in fact encouraged it so that proceedings under the Act could be commenced. In fact, Lederle is on the record in the proceedings below as having characterized proceeding under the Act as a "no lose option for the minor plaintiff."

Under 42 U.S.C. § 300aa-16(c) statutes of limitations are tolled during the pendency of a petition. Pursuant to 42 U.S.C. § 300aa-7, a claimant is permitted to reject an award or decision rendered under the Act and then reinstitute a civil tort action. If this option is taken, 42 U.S.C. § 300aa-21(c) provides for a claimant to pursue civil remedies "within the period prescribed by limitations of actions under State law applicable to such actions." Significantly, the statute of limitations for a suit to be filed on Jessica's behalf as of this writing still has not run. This is because Jessica was born on May 31, 1978 and pursuant to 42 U.S.C. § 300aa-16(c) the statute of limitations was tolled for the period of time in which her petition was pending under the Act — which was a period in excess of four years.

Further, 42 U.S.C. § 300aa-22(e) titled "Preemption" states:

> No state may establish *or enforce* a law which prohibits an individual from bringing a civil action against the vaccine manufacturer for damages for a vaccine-related injury or death if such civil action is not barred by this part.
> (Emphasis added).

Petitioner's cause of action was not "barred by this part."

The opinion below seized exclusively upon the language of § 300aa-22(e) to the exclusion of all other provisions contained in the Act. Reading § 300aa-22(e) in isolation, the opinion below found the language of the section to be "susceptible to inconsistent interpretations as to whether the Act preempts state statutes of limitation." Rather than considering the Act as a whole and considering also the Act's

various provisions addressing limitations, dismissals, and post-election refiling, the opinion below looked instead to the legislative history associated with § 300aa-22(e). There is no need to resort to legislative history, however, when a statute is plain and unequivocal on its face. *Reid v. Department of Commerce*, 793 F.2d 277, 281 (Fed. Cir. 1986) *citing United States v. Oregon*, 366 U.S. 643, 648 (1961), *reh'g denied*, 368 U.S. 870 (1961). A court should resort to legislative history only if "a literal interpretation would lead to an incongruous result." *United States v. Bryan*, 339 U.S. 323, 338 (1950). Examples of incongruous results are where "a literal reading would impute to Congress an irrational purpose," *United States v. Bryan*, 339 U.S. 323, 338 (1950), where a literal reading would "thwart the obvious purposes of the statute," *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978), or where a literal reading would "lead to a result at variance with the policy of the legislation as a whole," *Trustee[s] of Indiana University v. United States*, 618 F.2d 736, 739 (1980). A literal reading of § 300aa-22(e) considered with the statute as a whole and also with § 300aa-11(a)(5)(A) (providing that dismissals are without prejudice) and § 300aa-16(c) (providing that state statutes of limitation are tolled while petitions filed pursuant to the Act are pending), leads to a conclusion that Congress intended to preempt state statutes of limitations that bar the post-election refiling of civil actions.

In direct contravention of the plain language contained in the Act the opinion below enforces a state law (*i.e.*, 735 ILCS 5/13-217) the application of which is not even implicated by the facts yet the effect of which prohibits petitioner from bringing her post-election civil action.

The Illinois statute, 735 ILCS 5/13-217, is correctly characterized in the opinion below as a "savings statute." As to the purpose of § 13-217, the opinion below quotes *Reyes v. Court of Claims of the State of Illinois*, __ Ill. App. 3d __, 702 N.E.2d 224, 230 (1998) for the proposition that it, "enumerates the circumstances under which the statute of limitations for certain actions *may be extended*." (emphasis added).

As to Jessica Evans, due to a combination of factors no statute of limitations has yet run. First, the date of her birth when considered with the fact that the statute of limitations was tolled for the period in which her petition in the United States Claims Court was pending, means that the statute of limitations has not yet run. Second, at all times relevant Jessica has been a disabled person.

Under such circumstances there is no basis to look to a savings statute designed to preserve or extend the limitations period. If the statute is not implicated then neither is the judicially-created "one refiling rule" engrafted to the statute by Illinois courts. Using the "one refiling rule" to deprive petitioner of her cause of action, in addition to being contrary to 42 U.S.C. § 300aa-22(e), is contrary to 42 U.S.C. § 300aa-21(c) since it has the effect of shortening the statute of limitations period, and is also contrary to 42 U.S.C. § 300aa-11(a)(5)(A) as it converts a dismissal granted *without prejudice* to a dismissal *with prejudice*.

Following proper statutory construction principles and reading the Act as a whole and considering the "communal existence" between the various sections, the plain language of the Act prohibits states from establishing or enforcing statutes of limitations that prohibit a petitioner from re-filing

a post-election civil action. Contrary to the conclusion reached in the opinion below, such a result is consistent with the purpose for which the National Childhood Vaccine Injury Act was created as it encourages persons to dismiss pending civil actions to pursue a remedy under the Act. The opinion below creates a chilling effect by adding uncertainty to the dismissal *without prejudice* language contained in § 300aa - 11(a)(5)(A) and it creates a disincentive to dismiss civil actions in favor of proceeding under the Act.

The opinion below must be reversed because it creates a result that is contrary to the plain express language of the Act.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW WEAKENS THE PRINCIPLE OF PREEMPTION AND IT IS CONTRARY TO THE PURPOSES FOR WHICH THE VACCINE INJURY COMPENSATION ACT WAS CREATED.

The petition for writ of certiorari should be granted because the opinion below failed to duly consider that, as this Court has held, a state rule may be preempted if it would, "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Felder v. Casey*, 487 U.S. 131, 138 (1988).

The provisions of the Act that are relevant to this cause clearly show the existence of a legislative scheme designed to encourage injured parties to seek their remedy through the Act without extinguishing their right to later pursue an alternative remedy through civil litigation. The interpretation

given to the relevant provisions of the Act by the opinion below not only deprives petitioner of a remedy, but further creates a disincentive for similarly situated injured parties to seek their remedy under the Act. The opinion below sends a clear message that while an injured party may elect to dismiss a pending civil action in order to pursue a claim under the Act, he or she does so at their peril since, if the opinion below is allowed to stand, the dismissal "may" or "may not" result in a dismissal *with prejudice*. Such an interpretation of the Act is contrary to the Act's express language — that dismissals are to be *without prejudice*. Such an interpretation of the Act was never intended by Congress. As such, the opinion below truly stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Felder v. Casey*, 487 U.S. 131, 138 (1988).

When Congress enacted the National Childhood Vaccine Injury Act it did so to encourage injured persons with preexisting unresolved claims to utilize the administrative process established under the Act. 42 U.S.C. § 300aa-10(a) In fact, the Act specifically provides, "it shall be the ethical obligation of attorneys to advise clients of the existence of the Vaccine Injury Compensation Program and to encourage their participation through the filing of a petition." 42 U.S.C. § 300aa-10(b).

To further encourage participation under the Act it is clear that Congress drafted the Act in such a way as to provide certain safeguards designed specifically to preserve civil causes of action in the event a claimant elected not to accept disposition on a petition filed under the Act. A clear example of this intent is shown by 42 U.S.C. § 300aa-11(a)(5)(A) (providing for dismissal of pending civil actions *without*

prejudice); 42 U.S.C. § 300aa-16(c) (tolling statutes of limitations during pendency of vaccine claims); and 42 U.S.C. § 300aa-17 (providing right to reject award under Act and reinstitute civil proceedings).

In addition to the above provisions, Congress felt so strongly about preserving an injured party's right to bring a civil action that it included a preemption clause expressly preempting states from "establishing or enforcing" laws which would prevent bringing a civil action. 42 U.S.C. § 300aa-22(e).

It is clear that Congress crafted the Act to pull in as many persons as possible under the Act. For persons like petitioner, who were already involved in civil actions, Congress could not within constitutional limits apply the Act retroactively to deprive them from continuing their civil actions. Instead Congress sought to create an incentive for such persons to voluntarily dismiss their civil actions and seek a remedy under the Act. The incentive was the dismissal *without prejudice* expressly provided for in § 300aa-11(a)(5)(A). To accomplish this purpose the language of § 300aa-11(a)(5)(A) must be given broad effect. By contrast the opinion below means a plaintiff "may" obtain a voluntary dismissal but it "may" or "may not be" *without prejudice* depending upon the circumstances. The uncertainty which obtains from such an interpretation will surely not encourage plaintiffs to dismiss their pending civil actions to pursue remedies under the Act. Indeed, the Magistrate whose "Report and Recommendation" was rejected by the opinion below recognized that, "[e]nforcement of the Illinois statute with the one refiling rule interpretation would defeat the plan Congress established."

In addition to the plain language of the Act and the express preemption clause, the opinion below fails to duly consider the principles conflict preemption.

Conflict preemption occurs under circumstances where it is impossible to comply with both federal and state law or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress as manifested in the language, structure, and underlying goals of the federal statute at issue. *American Agriculture Movement v. Board of Trade*, 977 F.2d 1147 (7th Cir. 1992) Applying 735 ILCS 5/13-217 stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress as expressed in the National Childhood Vaccine Injury Act because it creates a disincentive to seek a remedy under the Act.

The Act contains an express preemption clause that the opinion below disregards. In addition, the opinion below is contrary to the principles of conflict preemption. Preemption is vital to the proper functioning of our system of governance. The opinion below cannot be allowed to stand because it undermines what Congress intended when it created the National Childhood Vaccine Injury Act and it weakens the principles of preemption.

CONCLUSION

The opinion below converts the statutorily mandated dismissal *without prejudice* to a dismissal *with prejudice* and in so doing contravenes the express language of the Act and frustrates the clear intent Congress had and objectives it sought to achieve in enacting the Act. The proper construction of the National Childhood Vaccine Injury Act is an important question of federal law that should be settled by this Court.

Accordingly, Kathleen Evans, as Conservator of Jessica Evans, a protected person, respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED FEBRUARY 3, 1999

Kathleen EVANS, as Conservator of Jessica EVANS, a protected person, Plaintiff-Appellant,

v.

LEDERLE LABORATORIES, Link Clinic, and O. Sharma, Defendants-Appellees.

No. 98-1293.

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 25, 1998.

Decided Feb. 3, 1999.

* * *

Before CUDAHY, COFFEY and KANNE, Circuit Judges.

CUDAHY, Circuit Judge.

During the first year of her life, Jessica Evans received three doses of a diphtheria, pertussis and tetanus (DPT) vaccine manufactured by Lederle and administered by Sharma, a physician, at the Link Clinic. Several years later, Jessica's mother, Kathleen Evans, filed suit on her behalf seeking to recover damages for injuries allegedly caused by the vaccine. A confusing chronology of litigation ensued culminating in this appeal.

Appendix A

On August 14, 1985, Evans sued the Link Clinic and Sharma in state court. That action was voluntarily dismissed without prejudice to make way for a diversity action filed in the district court on June 8, 1990, naming as defendants Lederle, the Link Clinic and Sharma. On October 1, 1990, Evans filed suit in the Court of Claims seeking an award under the National Childhood Vaccine Injury Act (the "Vaccine Act"), 42 U.S.C. § 300aa-1 et seq. That filing necessitated the voluntary dismissal of the pending diversity action. When the Court of Claims subsequently dismissed the Vaccine Act claim with prejudice, Evans went back to the district court and refiled the diversity action on February 28, 1995. The Link Clinic and Sharma moved to dismiss the claims against them pursuant to the Illinois saving statute which allows a plaintiff just one opportunity to refile an action that has been voluntarily dismissed. See 735 ILCS 5/13-217. The magistrate judge determined that the Illinois rule was preempted by the Vaccine Act and recommended that Evans be allowed to proceed with her action. But the district court rejected the magistrate judge's recommendation on the ground that the Illinois rule was not preempted. Applying the Illinois rule, the court dismissed the Link Clinic and Sharma from the case and subsequently granted Lederle's motion for judgment on the pleadings. We affirm.

I.

We review do novo the district court's decision to dismiss the Link Clinic and Sharma as defendants. A motion to dismiss is granted only if "it appears beyond doubt that the plaintiff can prove no facts sufficient to support [her] claim for relief, and the facts in the complaint are viewed in

the light most favorable to the non-moving party." Flenner v. Sheahan, 107 F.3d 459, 461 (7th Cir.1997); see also City Nat. Bank of Florida v. Checkers, Simon & Rosner, 32 F.3d 277, 281 (7th Cir.1994). A motion for judgment on the pleadings is reviewed under the same standard as a motion to dismiss. See Flenner, 107 F.3d at 461; Frey v. Bank One, 91 F.3d 45, 46 (7th Cir.1996), cert. denied, 519 U.S. 1113, 117 S.Ct. 954, 136 L.Ed.2d 841 (1997). Thus, we also review the district court's decision to enter judgment on the pleadings in favor of Lederle de novo applying the same principles.

The Vaccine Act provides a no-fault compensation system for individuals harmed by childhood vaccines. The system involves a special procedure whereby a vaccine-injury plaintiff files a petition in the Court of Claims, naming the Secretary of Health and Human Services as respondent, seeking an award to be administered from a fund financed by a tax on vaccines. See 42 U.S.C. § 300aa-11 et seq. Recourse to the Court of Claims is mandatory as a general rule. See 42 U.S.C. § 300aa-11(a)(2)(A). However, a plaintiff, such as Evans, who was already in the throes of civil litigation when the Act came into effect was permitted but was not required to dismiss her civil action and bring a compensation claim under the Act.[1] See Amendola v. Secretary, Dept. Health & Human Serv., 989 F.2d 1180, 1184

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1. The Act provides that such a plaintiff "may, at any time within 2 years after the effective date . . . or before judgment, whichever occurs first, petition to have such action dismissed without prejudice or costs and file a petition [in the Court of Claims]." 42 U.S.C. § 300aa-11(a)(5)(A) (as amended in 1989).

(Fed.Cir.1993) (explaining the effect of the Act on pending litigation).

A curious feature of the Act is that filing a petition in the Court of Claims — whether mandatory or optional — does not signal the abandonment of traditional tort rights. Once proceedings in the Court of Claims have run their course, the vaccine-injury plaintiff is allowed to jump ship and initiate or resume a civil action.[2] Congress thus created a bias in favor of the federal compensation scheme by requiring vaccine-injury plaintiffs to exhaust the remedy under the Act before resorting to civil litigation. The result is "a new remedial system that interacts in a complicated way with traditional tort lawsuits." Schafer v. American Cyanamid Co., 20 F.3d 1, 3 (1st Cir.1994). It is in sync with this pas de deux between Vaccine Act claims and conventional lawsuits that we must hop in deciding this appeal.

Evans's original diversity action was pending in the district court when the Vaccine Act came into effect. She exercised her option to proceed under the Act and, having voluntarily dismissed the diversity action, filed a petition in the Court of Claims on October 1, 1990. The petition was dismissed with prejudice pursuant to a joint stipulation.[3]

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2. Specifically, the Act provides that once the Court of Claims has entered judgment, the petitioner must elect either to accept the award and formally abandon his or her tort rights or to reject the award and proceed by way of civil action. See 42 U.S.C. §§ 300aa-11(a)(2)(A)(i) & 300aa-21(a).

3. The fate of the petition is something of a mystery. The stipulation itself calls merely for the dismissal of Evans's claim with

(Cont'd)

Evans then elected to return to the district court and filed the present diversity action.[4] She advances two principal arguments — essentially a reiteration of the magistrate judge's view — in support of her bid to maintain that action. First, Evans contends that the Illinois saving statute is preempted by the Vaccine Act and therefore cannot operate to bar her suit. Alternatively, Evans argues that the refiling of her diversity action does not offend the Illinois rule.

II.

In determining whether a federal statute preempts state law, "our ultimate task is to ascertain the intent of Congress."

(Cont'd)
prejudice "for reasons addressed during a conference" with a special master. See Appellant's Br. at A-24. Defendants maintain that Evans's petition was time-barred because it should have been filed within two years of the effective date of the Act, October 1, 1988. Evans filed her petition on October 1, 1990, and, according to defendants, missed the deadline by a day. Evans keenly disputes this contention and explains the dismissal as a strategic decision motivated by differences in the type of proof required to sustain her claim in the district court as opposed to the Court of Claims.

4. Lederle questions whether Evans had a right of election in these circumstances. The Act allows a vaccine plaintiff to bring a civil action where the Court of Claims "has issued a judgment . . . on [the] petition." 42 U.S.C. § 300aa-11(a)(2)(A)(i)(I). Lederle contends that the Court of Claims never issued a "judgment" in this case. On its face, this provision does not require a judgment on the merits. Rather, we read the term "judgment" to connote a final disposition of a petition by the Court of Claims. Thus, we take the view that the dismissal of Evans's petition with prejudice triggered her right of election.

American Agric. Movement, Inc. v. Board of Trade, 977 F.2d 1147, 1154 (7th Cir.1992). We have noted that the Act restricts but does not eliminate the exercise of traditional tort rights. In fact, the Act not only recognizes the possibility of civil actions but goes a step further and declares that "[s]tate law shall apply to a civil action brought for damages for a vaccine-related injury or death." 42 U.S.C. § 300aa-22(a). Nevertheless, Evans contends that Congress expressly preempted the Illinois saving statute by virtue of the following provision:

> No State may establish or enforce a law which prohibits an individual from bringing a civil action against a vaccine manufacturer for damages for a vaccine-related injury or death if such civil action is not barred by this part.

42 U.S.C. § 300aa-22(e). Evans advocates a broad construction of this provision that would preclude any state rule that operates to prohibit a civil action against a vaccine manufacturer. Since the Illinois saving statute has this effect, Evans asserts that the rule cannot be applied consistent with the Act. The district court rejected this argument and held that § 300aa-22(e) does not extend to state statutes of limitations including the Illinois saving statute. Thus, before addressing whether Congress intended to preempt state statutes of limitations, we must first clarify whether the saving statute's one-refiling rule is properly classified as a rule of limitation.

The Illinois statute of limitations does not expressly bar two or more refilings of a suit. Rather, the one-refiling rule

has developed as a judicial gloss on the saving statute which provides in relevant part:

> Reversal or Dismissal. In the actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, if judgment is entered for the plaintiff but reversed on appeal, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction, then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or entered against the plaintiff, or after the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction.

735 ILCS 5/13-217.[5] The section is a saving provision "which allows a plaintiff to refile a cause of action if its prior

5. This statutory language was amended prospectively in 1995 by P.A. 89-7 § 15 (eff.Mar. 9, 1995) which the Illinois Supreme Court subsequently held to be unconstitutional in its entirety. See Best v. Taylor Machine Works, 179 Ill.2d 367, 228 Ill.Dec. 636, 689 N.E.2d 1057, 1104 (1997).

disposition was based on the reasons outlined in the statute." Timberlake v. Illini Hosp., 175 Ill.2d 159, 221 Ill.Dec. 831, 676 N.E.2d 634, 636 (1997). But while the one-year grace period is a boon for plaintiffs, Illinois courts have consistently held that the section permits no more than one refiling within that period. See id. ("[section 13-217] was not intended to permit multiple refilings of the same action"); Flesner v. Youngs Development Co., 145 Ill.2d 252, 164 Ill.Dec. 157, 582 N.E.2d 720, 720 (1991) ("We interpret the language of section 13-217 as providing for one and only one refiling regardless of whether the applicable statute of limitations has expired."); Gibellina v. Handley, 127 Ill.2d 122, 129 Ill.Dec. 93, 535 N.E.2d 858, 864 (1989) ("While a [voluntary dismissal] motion in conjunction with section 13-217 may protect the right of a plaintiff to have a decision in the particular case made on the merits of the claim by potentially permitting "two bites of the apple" when the first bite turns sour, the statutory scheme does not allow a third bite."); Gendek v. Jehangir, 119 Ill.2d 338, 116 Ill.Dec. 230, 518 N.E.2d 1051, 1053 (1988) (for the same proposition). The first filing is a reference point for statute of limitations purposes. Thus, the one-refiling rule operates as an integral part of the saving statute which courts have characterized as a rule of limitation. See Reyes v. Court of Claims of State of Illinois, 299 Ill.App.3d 1097, 234 Ill.Dec. 58, 702 N.E.2d 224, 230 (1998) ("This 'savings statute' enumerates the circumstances under which the statute of limitations for certain actions may be extended."); Andrews v. Heinold Commodities, Inc., 771 F.2d 184, 186 (7th Cir.1985) ("The borrowing of a state statute of limitations includes the state's tolling doctrines, which suspend the application of the statute of limitations in prescribed situations."); Cook v. Starling,

104 F.R.D. 468, 470 (N.D.Ill.1985) ("Section 13-217 . . . is part of the chapter titled 'Limitations,' and is part and parcel of Illinois' total statute of limitations scheme . . . ."). And we endorse that characterization for the purposes of the present appeal.

The issue then is whether Congress intended to preempt state statutes of limitations including the Illinois one-refiling rule. Evans argues that the Vaccine Act preempts any state rule — whether substantive or procedural — that bars civil actions. The language of § 300aa-22(e) supports this construction insofar as it provides that "[n]o State may establish or enforce a law which prohibits an individual from bringing a civil action . . . ." However, defendants offer a less expansive reading of the same language that suggests a more modest preemptive effect. They assert that the term "law," as it appears in § 300aa-22(e), refers only to a state's substantive law and does not extend to procedural rules or statutes of limitation. From this perspective, Congress intended to preempt only direct state prohibitions on civil actions that would override the Act's interplay between the federal compensation scheme and traditional tort rights; thus, Congress was not concerned with incidental state rules regulating the time and manner for the bringing of civil actions — even though those rules might restrict or actually bar proceedings. Reasonable minds could differ as to which of the proffered interpretations is correct. Since the plain language of § 300aa-22(e) is susceptible to inconsistent interpretations as to whether the Act preempts state statutes of limitation, we look to other indicia of statutory intent. See United States v. Thomas, 77 F.3d 989, 991 (7th Cir.1996) ("A court may look beyond the plain meaning of a statute

when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention.") (quoting Public Citizen v. United States Dept. of Justice, 491 U.S. 440, 454-55, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989)).

The view that state statutes of limitation are not preempted finds support within the legislative scheme. The Act contemplates the application of state statutes of limitation where a petitioner elects to institute civil proceedings after judgment in the Court of Claims. See 42 U.S.C. §§ 300aa-16(c) (Statutes of limitation are tolled during the pendency of a petition); and 300aa-21(c) (Once a petitioner has elected to file a civil action, any subsequent civil action "shall . . . be brought within the period prescribed by limitations of actions under State law applicable to such civil action."). Indeed, common sense suggests that if state statutes of limitation were preempted — and not replaced by federally prescribed limitations — vaccine-injury plaintiffs would have extraordinary freedom to commence lawsuits at a time and in a manner of their own choosing. This result would be contrary to an important federal purpose underlying the Act, namely, "to free manufacturers from the specter of large, uncertain tort liability, and thereby keep vaccine prices fairly low and keep manufacturers in the market." Schafer, 20 F.3d at 4 (citing legislative history); see also Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 565, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990) ("strict language . . . does not control, even if the statutory language has a plain meaning, if the application of that language will produce a result demonstrably at odds with the intention of its drafters") (internal quotations and citation omitted).

Appendix A

The legislative history of a statute is significant "when the statute is not clear or when the application of its plain language produces absurd or unjust results." United States v. Shriver, 989 F.2d 898, 901 (7th Cir.1993) (internal quotations and citation omitted). In determining that the Illinois one-refiling rule is not preempted, the district court relied on the House Report which explains § 300aa-22(e) in the following terms:

> State statutes that effectively foreclose individuals from bringing civil actions for vaccine-related injuries or deaths or [sic] preempted by this subsection. The Committee intends this preemption to apply even where a State has established a compensation system as an alternative to filing a civil action. It does not intend, however, to preempt statutes of limitations or other provisions of state law and practice that regulate the time or manner in which civil actions in general may be brought or maintained . . . .

H.R.REP. No. 99-908, at 27 (1986), U.S. Code Cong. & Admin. News 1986 at 6344, 6368. It is hard to imagine legislative history that speaks more directly to the issue and Evans offers no alternative history that would support her interpretation of the Act's preemptive effect.[6] In light of the

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6. In her Brief, Evans did not address this legislative history. Eventually, when pressed on rebuttal at oral argument, Evans's attorney took the position that the meaning of § 300aa-22(e) is plain and that recourse to legislative history is not required. As noted, we disagree.

statutory language, legislative scheme and, in particular, this legislative history, we agree with the district court that the Illinois one-refiling rule is not preempted by the Vaccine Act.

III.

Next we turn to the issue whether the present action is barred by the Illinois one-refiling rule. Statutes of limitations are generally considered part of the forum state's substantive law which federal courts must apply when sitting in diversity. See Guaranty Trust Co. v. York, 326 U.S. 99, 109-10, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945). Thus, we have applied the Illinois one-refiling rule in diversity cases. See, e.g., Locke v. Bonello, 965 F.2d 534 (7th Cir. 1992).[7] Moreover, we have previously recognized that the rule allows for a single refiling whether in state court or federal court. See Koffski v. Village of North Barrington, 988 F.2d 41, 43-44 (7th Cir.1993) (plaintiffs were barred from refiling in the district court where their suit had been voluntarily dismissed in state court and then dismissed for lack of subject matter jurisdiction in the district court). In other words, a plaintiff who has filed suit in state court and subsequently commenced diversity proceedings in the district court has exhausted the rule and cannot refile in either court for a second time. Regardless of the forum, Illinois permits a plaintiff just two bites at the apple.

Defendants contend that there has been a total of four filings with respect to Jessica's vaccine-related injuries: (1)

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7. In this regard, we reject Evans's argument that this case is governed by FED.R.CIV. 41, which allows a second refiling.

the state court action against the Link Clinic and Sharma; (2) the initial diversity action in the district court naming all three defendants; (3) the petition with the Court of Claims; and (4) the present diversity action.[8] With respect to the Link Clinic and Sharma, it is undisputed that there were two previous filings — in the state court and the district court, respectively — naming these defendants as parties. On the basis of Koffski, Evans exhausted the Illinois one-refiling rule when she voluntarily dismissed her state court action and commenced proceedings in the district court.

Evans seeks to escape from Koffski's grip by arguing that the Illinois rule is triggered only by a voluntary dismissal whereas she was compelled to seek relief in the Court of Claims. This suggestion is flatly contradicted by the Vaccine Act which expressly gave Evans the option to go to the Court of Claims or to proceed with her pending diversity action. For the purposes of the Illinois one-refiling rule, we see no principled reason to distinguish Evans's decision to forego her diversity action to petition the Court of Claims from her previous decision to abandon the state court in favor of a federal forum. In both instances, the policies underlying the Illinois rule are implicated insofar as Evans made a strategic choice regarding the most advantageous forum for the pursuit of her claims.

Evans also points out that in giving her the option to file a petition in the Court of Claims, the Act provided that her

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8. With respect to the third filing, it is an open question whether filing a petition in the Court of Claims under the Vaccine Act constitutes a filing for the purposes of the Illinois saving statute. But it is not necessary to resolve this question for present purposes.

civil action be "dismissed without prejudice." 42 U.S.C. § 300aa-11(a)(5)(A). From this premise, she infers a Congressional intent to permit the resumption of civil litigation purely as an incentive to plaintiffs like herself to forego pending civil actions in favor of compensation claims under the Act. But Congress gave all vaccine-injury plaintiffs — and not merely those who had civil actions pending — the right to resort to civil litigation after exhausting their remedies in the Court of Claims. Evans's contention is untenable because it fails to take account of the statutory caveat that the commencement or resumption of civil proceedings — as well as their substantive determination — is a matter for state law. See 42 U.S.C. §§ 300aa-21(c) & 300aa-22(a). To put it another way, there is no reason to believe that in deciding not to preempt state statutes of limitations Congress intended to make an exception for plaintiffs who had civil actions pending when the Act came into effect.

In any event, as far as Illinois is concerned, the circumstances in which Evans departed from the district court for the Court of Claims are not material to the application of the one-refiling rule. The Illinois Supreme Court has held that where a cause of action has been dismissed on two occasions, the plaintiff cannot refile regardless of the reason for the second dismissal. See Timberlake, 221 Ill.Dec. 831, 676 N.E.2d at 637 ("Under the statute, the reason a cause of action was originally dismissed is important in determining whether a plaintiff can subsequently refile, but after the case has been filed a second time, the reason for the second dismissal is of no consequence at all. No matter why the second dismissal took place, the statute does not give plaintiff

the right to refile again."). In the present case, it is sufficient that Evans voluntarily dismissed her state court action, that she refiled in the district court and that her case was dismissed for a second time. At least with respect to the Link Clinic and Sharma, the present action constitutes an additional filing that is barred by the Illinois saving statute.

The position with respect to Lederle is more problematic since Lederle was not named as a defendant in the state court action. Evans contends that because Lederle was technically a party only to the original diversity action, the present action constitutes the first refiling against Lederle and, as such, is permitted by the Illinois rule. Lederle counters that its absence from the initial proceeding is a mere technicality. It takes the position that the filings in state and federal court arose out of the same set of facts and therefore comprise the same proceedings for the purposes of the Illinois rule.

The Illinois rule does not differentiate on its face between actions brought against different defendants by the same plaintiff. Evans cites no instance in which a court in Illinois has ignored the rule on this basis. Illinois courts have held that, for the purposes of § 13-217, a complaint is deemed to be refiled where it contains the same cause of action as defined by res judicata principles. See D'Last Corp. v. Ugent, 288 Ill.App.3d 216, 224 Ill.Dec. 30, 681 N.E.2d 12, 16, app. denied, 174 Ill.2d 558, 227 Ill.Dec. 3, 686 N.E.2d 1159 (1997). Res judicata bars a further suit if "the same facts were essential to maintain both actions" or if "a single group of operative facts gives rise to the assertion of relief." Rodgers v. St. Mary's Hosp., 149 Ill.2d 302, 173 Ill.Dec. 642, 597 N.E.2d 616, 621 (1992) (internal quotations and

citations omitted). Here, Evans's claims against all three defendants arise out of the same essential group of operative facts. Insofar as § 13-217 is designed to temper the litigious excesses of plaintiffs, it is reasonable to apply it to multiple refilings of the same action even against additional defendants. Otherwise, a plaintiff could prolong litigation indefinitely merely by failing to join necessary defendants. See Gendek, 116 Ill.Dec. 230, 518 N.E.2d at 1053 ("[Section 13-217] was intended to serve as an aid to the diligent, not a refuge for the negligent.").[9] Thus, we believe that Evans should not be able to maintain this action simply because Lederle was not named as a party in the original state court action.[10]

We are mindful that for Evans the dismissal of this suit so far down the road to recovery may be a bitter pill to swallow. We also recognize that there may be a technical ring to some of the analysis. But to allow Evans to institute fresh proceedings more than 13 years after she first filed suit would invite the evils of uncertain and protracted litigation, which Illinois has chosen to contain. Having voluntarily sought relief before the Court of Claims and having failed in that endeavor, Evans must satisfy the Illinois

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9. Another way of looking at the problem — which also casts it in a light favorable to Lederle — is to say that Lederle should not be penalized for Evans's oversight in failing to include it as a defendant in the original state court action.

10. In light of this conclusion, it is not necessary to consider Lederle's alternative argument, namely that the petition before the Court of Claims constitutes a refiling for the purpose of the Illinois saving statute.

statute of limitations in order to pursue her diversity action in the district court. Unfortunately for Evans, the Illinois Supreme Court has made clear that the saving statute allows for only one refiling. Evans's refiling of the present action was therefore barred.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS DATED OCTOBER 31, 1995

Kathleen EVANS, as Conservator of Jessica Evans, a Protected Person, Plaintiff,

v.

Lederle LABORATORIES, A DIVISION OF AMERICAN CYANAMID COMPANY, a corporation;
Link Clinic, a corporation; and Dr. O. Sharma, Defendants.

No. 95-1341.

United States District Court,
C.D. Illinois.

Oct. 31, 1995.

* * *

ORDER

MIHM, Chief Judge.

Before the Court is the Report and Recommendation of Magistrate Judge David G. Bernthal [# 14] in which Magistrate Judge Bernthal recommends that Defendants Link Clinic and Dr. O. Sharma's Motion to Dismiss [# 4] be denied. This Court has reviewed all of the pleadings submitted in support of and in opposition to the Motion to Dismiss, as well as the Objection to the Report and Recommendation, and for the reasons stated herein REJECTS the Report and Recommendation. The Motion to Dismiss [# 4] is GRANTED.

Appendix B

Background

Jessica Evans (hereinafter "Jessica") is a minor born on May 31, 1978, and a resident of Colorado. Plaintiff, Kathleen Evans (hereinafter "Evans"), filed the Complaint in the case at bar on behalf of Jessica. The Complaint states that this Court's jurisdiction arises from 28 U.S.C. § 1332 and 42 U.S.C. § 300aa-16. Evans and Jessica are residents of the State of Colorado, and the Defendants are not. The amount in controversy exceeds $50,000. Jurisdiction is properly based on 28 U.S.C. § 1332.

Count I of the Complaint alleges that Defendant Lederle Laboratories sold a diphtheria, pertussis, and tetanus (hereinafter "DPT") vaccine to Defendant Link Clinic. Link Clinic is located in Coles County, Illinois. Count I further states that Defendant Dr. O. Sharma, a practicing physician at Link Clinic, administered or caused to be administered a Lederle DPT vaccine to Jessica. Count I specifies that Lederle DPT vaccines were administered to Jessica on the following dates: July 13, 1978, October 10, 1978, and December 11, 1978. Count I maintains that the Lederle DPT vaccine was unreasonably dangerous and that the pertussis element contained in the vaccine caused Jessica injury. In Count II Evans claims that Lederle failed to adequately advise physicians of the risks present in the pertussis component of the vaccine. Count III charges Lederle with negligence. Count IV seeks to hold Defendant Link Clinic and Defendant Dr. Sharma jointly and severally liable for negligence.

A brief review of this case's procedural history will prove useful during the later analysis. On August 14, 1985,

Appendix B

Evans filed a complaint in Cook County, Case No. 85-19357. That case was later transferred to Coles County and renumbered 86-L-57. Defendants Link and Sharma were voluntarily dismissed from 86-L-57 on July 14, 1988. On June 22, 1988, Evans filed an action in Federal District Court, Case No. 88-3191. That action was voluntarily dismissed on August 29, 1990. Thereafter, Evans filed an action in the Court of Claims, Case No. 90-2265V, naming the Secretary of Health and Human Services as the defendant, as is required by 42 U.S.C. § 300aa-12(b). Evans states that no decision was reached on the merits of this action and that the matter was dismissed by the Court of Claims on January 31, 1995.

Discussion

On May 10, 1995, Defendants Link Clinic and Dr. Sharma moved to Dismiss Count IV of the Complaint. In support of the Motion to Dismiss, these Defendants assert that Evans filed three prior actions and that this matter is barred by 735 ILCS 5/13-217. The statute provides, in relevant part:

> 5/13-217. Reversal or dismissal. In the actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, if judgment is entered for the plaintiff but reversed on appeal, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action

> is dismissed by a United States District Court for lack of jurisdiction, then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or entered against the plaintiff, or after the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction.

735 ILCS 5/13-217. Illinois courts refer to this rule as the "one filing rule." See, e.g., Gendek v. Jehangir, 119 Ill.2d 338, 343-44, 116 Ill.Dec. 230, 232, 518 N.E.2d 1051, 1053 (1988) (this provision prohibits multiple refilings of a lawsuit after voluntary dismissal). The Seventh Circuit has held that federal courts sitting in diversity should apply the one filing rule to cases in which the plaintiff first filed in state court, with the second and third filings in federal court. Koffski v. Village of North Barrington, 988 F.2d 41, 44 (7th Cir.1993).

In opposition to the motion to dismiss, Evans asserts that the procedural rules of the State of Illinois, including 735 ILCS 5/13-217 of the Code of Civil Procedure, have no application to a case proceeding in federal court. This Court disagrees. Jurisdiction in the case at bar arises under the diversity statute, 28 U.S.C. § 1332. A federal court sitting in diversity must apply the substantive law of the forum state. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed.

1188 (1938); see also S.A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist., 60 F.3d 305, 309-10 (7th Cir.1995). There are some circumstances in which a state "procedural" rule may be "substantive" in application. S.A. Healy, 60 F.3d at 310 (citations omitted). For example, although a statute of limitations may appear procedural at first blush, it is well settled that statutes of limitation are considered substantive rules for purposes of the Erie doctrine. See Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109-110, 65 S.Ct. 1464, 1469-70, 89 L.Ed. 2079 (1945). Under Illinois' Code of Civil Procedure § 13-217 exists as a savings statute and as such is "part and parcel of Illinois' total statute of limitations." Cook v. Starling, 104 F.R.D. 468, 470 (N.D.Ill.1985). In Abdallah v. Slagg, the court specifically held that "Illinois' saving statute is substantive in nature under Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and, thus, a federal court sitting in diversity should apply ¶ 13-217." Abdallah, 803 F.Supp. 220, 222 (N.D.Ill.1992) (citations omitted). This Court finds that as an element of the statute of limitations, and therefore a substantive state rule of law, 735 ILCS 5/13-217 should be applied by a federal court sitting in diversity. See Koffski, supra at 44.

The Magistrate Judge's Report and Recommendation suggests that the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-1, et seq., (1991 & West Supp.1995),[1]

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1. The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, as amended 42 U.S.C.A. § 300aa-1, et seq., as amended by the Vaccine and Immunization Amendments of 1990, Pub.L. No. 101-502 (1990).

preempts the effect of 735 ILCS 5/13-217. The Magistrate cites § 300aa-22(e) of the Vaccine Act, which provides:

> No State may establish or enforce a law which prohibits an individual from bringing a civil action against a vaccine manufacturer for damages for a vaccine-related injury or death if such civil action is not barred by this part.

42 U.S.C. § 300aa-22(e). This Court respectfully disagrees with the Magistrate's conclusion regarding preemption. Section 300aa-22 of the Vaccine Act provides that "[s]tate law shall apply to all civil actions brought for damages for a vaccine-related injury or death." 42 U.S.C. § 300aa-22(a). Moreover, a brief review of the legislative history surrounding the Vaccine Act clearly establishes that Congress did not intend to preempt State statutes of limitations. The House Report provides, in relevant part, as follows:

> State statutes that effectively foreclose individuals from bringing civil actions from vaccine-related injuries or deaths [are] pre-empted by this subsection. The Committee intends this preemption to apply even where a State has established a compensation system as an alternative to filing a civil action. It does not intend, however, to preempt statutes of limitations or other provisions of state law and practice that regulate the time or manner in which civil actions in general may be brought or maintained.

Appendix B

H.R.Rep. No. 99-908, 99th Cong.2d Sess., reprinted in 1986 U.S.Code Cong. & Admin.News at pp. 6287, 6344, 6368. Therefore, this Court finds that the Vaccine Act in no way preempts State statutes of limitation, including 735 ILCS 5/13-217.

As a final matter, this Court must determine whether 735 ILCS 5/13-217 does, in fact, bar Evans' action against Defendants Link Clinic and Dr. O. Sharma. As noted above, Evans first filed an action in state court in 1985. After a venue transfer, she voluntarily dismissed the case. In June 1988, Evans filed an action in federal district court, and she petitioned for voluntarily dismissal of that case in August 1990. In October 1990, Evans filed an action in the Court of Claims under the Vaccine Act pursuant to 42 U.S.C. § 300aa-11(b). She withdrew that action, as is permitted by § 300aa-21(a) of the Vaccine Act, in January 1995. She filed the case at bar on February 28, 1995.

The Vaccine Act provides that a plaintiff who has a pending civil action for damages arising from a vaccine-related injury or death "may, at any time within 2 years after the effective date of the subpart . . . petition to have such action dismissed without prejudice or costs and file a petition under subsection (b) of this section." 42 U.S.C. § 300aa-11(a)(5)(A) (emphasis added). The effective date of the Vaccine Act was October 1, 1988. Amendola v. Secretary of Dept. of Health and Human Services, 989 F.2d 1180, 1181 (Fed.Cir.1993). Evans' federal court action, filed in June 1988, was pending upon the effective date of the Vaccine Act. Therefore, the Vaccine Act allowed Evans the opportunity to voluntarily dismiss her pending action

and pursue a remedy through the Court of Claims. § 300aa-11(a)(5)(A) & (b)(1). However, nothing within the Vaccine Act indicates that a plaintiff is required to voluntarily dismiss a pending action. In fact, the legislative history clearly indicates that Congress intended plaintiffs to have a choice. The House Report states:

> If a person . . . has a tort action against a manufacturer pending at the time of enactment, he or she may elect to maintain such action or may, within two years of enactment . . . elect to withdraw the action without prejudice and enter the compensation system. If such a person elects to maintain the civil action, he or she is permanently barred from entering the compensation system (emphasis added).

H.R.Rep. No. 99-908, 99th Cong., 2d Sess., pt. 1, at 14, reprinted in U.S.Code Cong. & Admin.News 6344, 6355. This Court finds that the election afforded plaintiffs with a pending action is not mandatory, but discretionary. See, e.g., Amendola v. Secretary of Dept. of Health and Human Services, 1991 WL 43027 (March 14, 1991) (§ 300aa-11(a)(5)(A) gives plaintiffs a choice to elect the federal remedial program or pursue their pending civil action), sustained, 23 Cl.Ct. 621 (July 14, 1991), aff'd, 989 F.2d 1180 (Fed.Cir.1993).

Finding that Evans' voluntary dismissal was a discretionary act has serious ramifications for the case at bar. At the time Evans filed her first federal court petition, June 1988, Illinois' savings statute, 735 ILCS 5/13- 217,

which governed the federal proceedings under the Erie doctrine, would have barred her from filing any further lawsuit on the same claims. Therefore, Evans should not have voluntarily dismissed her federal claim, as she may not file another.

Section 300aa-21(a) of the Vaccine Act permits plaintiffs to make an election which effectively disregards the Claims Court decision. However, § 300aa-21(c) clearly provides that State law controls in determining the applicable limitations rules. As discussed previously, 735 ILCS 5/13-217 is part and parcel of Illinois' limitations rules. Although Congress granted plaintiffs the ability to reject compensation awards, or the lack thereof, the availability of this alternative does not preempt the State limitations rules. See, supra, at 5-6. Therefore, this Court finds Count IV of Evans' Complaint barred by 735 ILCS 5/13-217.

Conclusion

For the reasons stated herein, Magistrate Judge David G. Bernthal's Report and Recommendation [# 14] is REJECTED. The Motion to Dismiss Count IV [# 4] is GRANTED. This matter is referred to Magistrate Judge Robert J. Kauffman.

APPENDIX C — MOTION TO DISMISS WITHOUT PREJUDICE SO AS TO ALLOW PROCEEDING UNDER THE NATIONAL VACCINE INJURY COMPENSATION ACT DATED AUGUST 22, 1990, FILED AUGUST 24, 1990 AND ALLOWED AUGUST 28, 1990

IN THE UNITED STATES CIRCUIT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

No. 88-3191

JESSICA ANN EVANS, etc., et al.,

Plaintiffs,

vs.

LEDERLE LABORATORIES, a Division of American Cyanamid Company, a corporation, et al.,

Defendants.

MOTION TO DISMISS WITHOUT PREJUDICE SO AS TO ALLOW PROCEEDING UNDER THE NATIONAL VACCINE INJURY COMPENSATION ACT

COMES NOW Plaintiff Jessica Ann Evans, a minor, by her mother and next friend, Kathleen Evans, by her attorney, Joseph W. Phebus of the law firm of Phebus, Tummelson, Bryan & Knox, and pursuant to the Federal Rules of Civil Procedure and the National Vaccine Injury Compensation Act, 42 U.S.C., Section 300aa-1, et seq., moves to dismiss

her complaint herein without prejudice so that she may pursue her remedy under the National Vaccine Injury Compensation Program and preserve her right to refile against all defendants herein in the event she should decide not to accept any award or decision of the Court of Claims under said Act, and in support thereof shows unto the Court:

1. That the suit arises out of the administration of DPT vaccination and of a personal injury resulting therefrom to Jessica Evans, a minor.

2. That the manufacturer of the vaccine has been determined to be Lederle Laboratories, a division of American Cyanamid Company, a corporation.

3. That the administrator of the vaccine was Dr. O. Sharma and his employer at the time of the administration, Link Clinic, a corporation.

4. That under the National Vaccine Injury Compensation Program, 42 U.S.C., Section 300aa-1, et seq., the plaintiff has the right to dismiss this proceeding without prejudice as to the defendants herein, to-wit: the administrator of the vaccine and the manufacturer of the vaccine, and thereafter if she does not accept the result of the Court of Claims proceeding under the Act, she may refile her action within the time fixed by said Act against the defendants herein pursuant to 42 U.S.C., Section 300aa-21.

Appendix C

JESSICA ANN EVANS, et al.,
Plaintiffs,
By their Attorneys, PHEBUS,
TUMMELSON, BRYAN & KNOX

BY: s/ Joseph W. Phebus
JOSEPH W. PHEBUS

_x_ ALLOWED
___ DENIED s/ Richard Mills
8/28/90 RICHARD MILLS
U.S. District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED APRIL 30, 1999

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, Illinois 60604

April 30, 1999

Before

Hon. Richard D. Cudahy, *Circuit Judge*

Hon. John L. Coffey, *Circuit Judge*

Hon. Michael S. Kanne, *Circuit Judge*

Appeal from the United States District Court for the Central District of Illinois, Peoria Division.

No. 95 C 1341

Michael M. Mihm, *Judge.*

No. 98-1293

KATHLEEN EVANS, as Conservator of JESSICA EVANS, a protected person,

Plaintiff-Appellant,

v.

Appendix D

LEDERLE LABORATORIES, LINK CLINIC,
and O. SHARMA,

Defendants-Appellees.

ORDER

On consideration of the petition for rehearing filed by the plaintiff-appellant, KATHLEEN EVANS, as Conservator of JESSICA EVANS, a protected person, in the above-entitled case, all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is, hereby DENIED.

Supreme Court, U.S.
FILED
AUG 30 1999
OFFICE OF THE CLERK

99-198

No.

In the

Supreme Court of the United States

KATHLEEN EVANS, as Conservator of
JESSICA EVANS, a protected person,

Petitioner,

v.

LEDERLE LABORATORIES, LINK CLINIC
and O. SHARMA,

Respondents.

RESPONDENT LINK CLINIC AND O. SHARMA'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

The Petitioner had numerous alternative remedies available for the pursuit of her claims. Prior to seeking recovery under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-1, *et seq.* the Petitioner voluntarily dismissed an action in the Fifth Judicial Circuit of the State of Illinois and likewise dismissed an action in the United States Central District of Illinois. Pursuant to 735 ILCS 5/13-217 the Petitioner was prevented by Illinois law from filing a third lawsuit. The Petitioner failed to recover under the National Childhood Vaccine Injury Act and then filed a third lawsuit in the United States District Court for the Central District of Illinois. The District Court appropriately dismissed the action. The Illinois Supreme Court has consistently held that a Petitioner is entitled to only one refiling of a lawsuit. The District Court appropriately dismissed the Petitioner's complaint when she attempted a second refiling.

The Petitioner further claims that the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-1, *et seq.* preempts the application of 735 ILCS 5/13-217. The Petitioner elected to pursue a remedy under the National Childhood Vaccine Injury Act, but she was neither compelled to do so nor did Federal preemption require her to do so. The Petitioner, by voluntarily dismissing her lawsuit for the second time, abandoned any effort to recover any civil action against Respondent's Link Clinic and O. Sharma. The decision of the District Court applying 735 ILCS 5/13-217 in dismissing the Petitioner's complaint was appropriate as was the decision of the United States Court of Appeals for the Seventh Circuit.

THE PETITION SHOULD BE DENIED BECAUSE ILLINOIS LAW LIMITS A PARTY TO ONE REFILING OF A LAWSUIT

Under Illinois law 735 ILCS 5/13-217 a party may dismiss a lawsuit and then begin a new action within one year or within the remaining period of limitation. The Petitioner dismissed the action pending in the court system of the State of Illinois, refiled in the United States District Court for the Central District of Illinois and then dismissed that action electing to proceed under the National Childhood Vaccine Injury Act. There can be no persuasive argument that 735 ILCS 5/13-217 is inapplicable to the facts of this case. A federal court sitting in diversity must apply the substantive law of the forum state. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 SCt. 817 (1938). Statutes of limitations have long been recognized as part of a State's substantive law where their provisions may be outcome determinative or are to be considered as part of a State's "rules of decision." *Guaranty Trust of New York v. York*, 326 U.S. 99, 111, 65 SCt. 1464, 1470 (1945). The District Court as well as the United States Court of Appeals for the Seventh Circuit appropriately relied upon *Koffski v. Village of North Barrington*, 988 F.2d 41 (7th Cir. 1993) which holds that § 13-217 applies and that a plaintiff is entitled to a single refiling.

The Illinois Supreme Court has consistently held that § 13-217 provides for a single refiling. *Flesner v. Young's Developments Co.*, 145 Ill.2d 252, 582 N.E. 2d 720, (Ill., 1991); *Gendek v. Jehangir*, 119 Ill.2d 338, 518 N.E. 2d 105, (Ill., 1988); *Timberlake v. Illinois Hospital*, 175 Ill.2d 159, 676 N.E. 2d 634 (Ill., 1997). The Petitioner suggests that the statute of limitations has not run regarding the disabled

minor's claim, but such an assertion was addressed by the Illinois Supreme Court in *Flesner v. Young's Development Co.,* 145 Ill.2d 252, 582 N.E. 2d 720 (Ill., 1991) wherein the Court stated that Section 13-217 "expressly permits one, and only one, refiling of a claim even if the statute of limitations has not expired." *Flesner v. Young's Development Co.,* 145 Ill.2d at 254, 582 N.E. 2d at 721 (Ill., 1991).

THE PETITION SHOULD BE DENIED BECAUSE CONGRESS DID NOT INTEND FOR THE CHILDHOOD VACCINE INJURY ACT TO PREEMPT THE APPLICATION OF A STATE'S STATUTE OF LIMITATIONS

The Petitioner suggests that 42 U.S.C. § 300 aa-11(a)(5)(A) permits her to dismiss a viable pending action and proceed without consequence. The Petitioner further suggests that one should ignore Congressional intent.

The United States Court of Appeals for the Seventh Circuit specifically addressed the Congressional intent question and determined that the legislative history specifically addressed the statute of limitations question. The Court determined that the legislative history spoke directly to the issue of the statute of limitation and that the Petitioner offered no alternative history to support her interpretation of the Act. It must be underscored that § 300 aa-11(a)(5)(A) was discretionary in that one who had a pending action "may" proceed under the National Childhood Vaccine Injury Act.

THE PETITION SHOULD BE DENIED BECAUSE TO DO OTHERWISE WOULD RATIFY THE PETITIONER'S FLAWED LEGAL STRATEGY

All actions must have finality. The Petitioner suggests there is no limitation or termination of her remedies. The Petitioner had a viable cause of action that was pending in the Circuit Court for the Fifth Judicial Circuit, Coles County in the State of Illinois. She elected to dismiss that cause of action. The Petitioner then elected to file her action in the United States District Court for the Central District of Illinois. She had a viable action pending in that forum until she again unilaterally elected to dismiss the cause of action to seek recovery in the Court of Claims. In dismissing the action in the Central District of Illinois the Petitioner knew that she had exhausted her one refiling under Illinois law. There have been choices available to the Petitioner since the birth of Jessica Evans in 1978 but any action against the Respondents was exhausted when the action was dismissed in the Central District of Illinois on August 28, 1990.

CONCLUSION

The Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondents
Link Clinic and O. Sharma

Supreme Court, U.S.
FILED
SEP 1 1999
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No. 99-198

In the

Supreme Court of the United States

KATHLEEN EVANS, as Conservator of JESSICA EVANS, a protected person,

Petitioner,

v.

LEDERLE LABORATORIES, LINK CLINIC and O. SHARMA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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20 pp

STATEMENT REQUIRED BY RULE 29.6

Lederle Laboratories, now known as Lederle Pharmaceuticals, is a Division of American Cyanamid Company. The parent company of American Cyanamid Company is American Home Products Corporation.

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National Childhood Vaccine Injury Act ("the Vaccine Act"), 42 U.S.C. § 300aa-1, *et seq.* 1, 2, 3, 10, 11

COUNTERSTATEMENT OF THE CASE

This case presents the question of whether the National Childhood Vaccine Injury Act ("the Vaccine Act"), 42 U.S.C. § 300aa-1, *et seq.*, preempts the one-refiling rule contained in the Illinois statutes of limitation. 735 ILCS 5/13-217. Because of certain omissions in the Statement of the Case of Petitioner, Kathleen Evans, as Conservator of Jessica Evans, the respondent, Lederle Laboratories, submits this Counterstatement of the Case so that this Court will have before it all facts pertinent to the disposition of this petition.

A. The National Childhood Vaccine Injury Act

The Vaccine Act was enacted by Congress in 1986. One of its principal purposes is to "free manufacturers from the specter of large, uncertain liability, and thereby keep vaccine prices fairly low and keep manufacturers in the market." *Schafer v. American Cyanamid Co.*, 20 F.3d 1, 4 (1st Cir. 1994). As the Court of Appeals noted in the decision below, the Vaccine Act was designed to provide "a no-fault compensation system for individuals harmed by childhood vaccines." *Evans v. Lederle Laboratories*, 167 F.3d 1106, 1108 (7th Cir. 1999); App. 3a. Under that compensation system, individuals who believed that they suffered a vaccine-related injury could seek a no-fault compensation award by filing a petition in the United States Court of Federal Claims, which names the Secretary of Health and Human Services as respondent. 42 U.S.C. § 300aa-11 *et seq.* Awards under the Vaccine Act are administered from a fund whose source of revenue is vaccine taxes. 42 U.S.C. § 300aa-11 *et seq.*

The Vaccine Act's applicability to any particular claim derives, by statute, from an assessment of the date of the claimant's injury and an assessment of whether civil litigation had been instituted at the time the Vaccine Act became effective. The oldest category of claims, such as the one at issue here, involved claimants who had both been injured and had filed suit before the effective date of the Vaccine Act. Such claimants were, as the Court of Appeals below noted, "permitted but . . . not required to dismiss (the) civil action and bring a compensation claim under the [Vaccine] Act." (*Evans*, 167 F.3d at 1108; App. 3a, *citing Amendola v. Secretary, Dept. Health & Human Serv.*, 989 F.2d 1180, 1184 (Fed. Cir. 1993). In this regard, the Vaccine Act provides that a previously injured claimant with pending litigation "may, at any time within 2 years after the effective date . . . or before judgment, whichever occurs first, petition to have such action dismissed without prejudice or costs and file a petition [in the Court of Claims]." 42 U.S.C. § 300aa-u(a)(5)(A) (as amended in 1989).[1] The Vaccine Act further provides

---

[1] Future claimants had somewhat different options available to them. Claimants who had sustained an injury but not filed suit before the effective date of the Vaccine Act were permitted either to file a civil action in court or a claim under the Vaccine Act. Once a claimant in this group filed a civil action, he or she was not then permitted to file a claim under the Vaccine Act. Claimants who had not yet sustained an injury at the time of the Vaccine Act's effective date were required to file a claim under the Vaccine Act before commencing a civil action. Thus, for the great majority of claimants for whom the compensation system created by the Vaccine Act has been available, "[r]ecourse to the Court of Claims is mandatory." *Evans*, 167 F.3d at 1108; App. 3a, *citing* 42 U.S.C. § 300aa-11(a)(2)(A).

that once the Court of Claims has entered judgment, "the petitioner must elect either to accept the award and formally abandon his or her tort rights or to reject the award and proceed by way of civil action." *Evans*, 167 F.3d at 1108 n.2; App. 4a, *citing* 42 U.S.C. §§ 300aa-11(a)(2) (A)(I) & 300aa-21(a). Because the petitioner had been injured before the effective date of the 1986 Act, she was required to dismiss her civil action if she chose to pursue compensation under the Act.

As the Court of Appeals noted, "filing a petition in the Court of Claims does not signal the abandonment of traditional tort rights." *Evans*, 167 F.3d at 1108; App. 4a. Thus, the Vaccine Act "recognizes the possibility of civil actions." *Evans*, 167 F.3d at 1109; App. 6a. With respect to civil actions, the Vaccine Act provides that "[s]tate law shall apply to a civil action brought for damages for a vaccine-related injury or death." 42 U.S.C. § 300aa-22(a). The Vaccine Act further provides that "[n]o state may establish or enforce a law which prohibits an individual from bringing a civil action against a vaccine manufacturer for damages for a vaccine-related injury or death if such civil action is not barred by this part." 42 U.S.C. § 300aa-22(e).

The legislative history of the Vaccine Act contains a House Report clarifying that the Vaccine Act was not intended to preempt state statutes of limitation. This Report provides that the Committee "does not intend . . . to preempt statutes of limitations or other provisions of state law and practices that regulate the time or manner in which civil actions may be brought or maintained . . . ." H.R. Rep. No. 99-908, at 27 (1986), U.S. Code Cong. & Admin. News 1986 at 6344, 6368. As the

Court of Appeals noted below, "[i]t is hard to imagine legislative history that speaks more directly to the issue . . . . " *Evans*, 167 F.3d at 1111; App. 11a. Petitioner never identified any legislative history to the contrary.

B. The Illinois Savings Statute

The Illinois savings statute whose application petitioner seeks to preempt is set forth at 735 ILCS 5/13-217. This savings statute allows, in certain enumerated circumstances,[2] a plaintiff to refile a civil action, and is therefore "a boon for plaintiffs." *Evans*, 167 F.3d at 1110; App. 8a.[3] The savings statute has repeatedly been interpreted by both Illinois and federal courts, however, as "providing for one and only one refiling regardless of whether the applicable statute of limitations has expired." *Flesner v. Youngs Development Co.*, 145 Ill. 2d 252, 253, 582 N.E.2d 720, 720 (Ill. 1991). *See also Koffski v. Village of North Barrington*, 988 F.2d 41, 43-44 (7th

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[2] The savings statute applies "if judgment is entered for the plaintiff but is reversed on appeal, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction." 735 ILCS 13/217.

[3] Because the savings statute provided such a boon to plaintiffs, the Illinois General Assembly sought to amend the statute in tort reform legislation. P.A. 89-7 § 15 (eff. Mar. 9, 1995). The Illinois Supreme Court, however, declared the tort reform legislation to be unconstitutional in its entirety. *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (Ill. 1997).

Cir. 1993); *Gibellina v. Handley*, 127 Ill. 2d 122, 535 N.E.2d 858, 864 (Ill. 1989); *Gendek v. Jehangir*, 119 Ill. 2d 338, 518 N.E.2d 1051 (Ill. 1988). The savings statute is "part and parcel of Illinois' total statute of limitations scheme." *Cook v. Starling*, 104 F.R.D. 468, 470 (N.D. Ill. 1985); *see also Reyes v. Court of Claims of State of Illinois*, 299 Ill. App. 3d 1097, 702 N.E.2d 224 (Ill. App. 1998).

C. The Parties And The Course Of Proceedings In The Courts Below

The petition arises from an action for bodily injuries in which plaintiff sought to impose liability upon Lederle for its role as the manufacturer of a diptheria, pertussis and tetanus ("DPT") vaccine which allegedly caused injury to Jessica Evans. As the Court of Appeals below noted, the lawsuit at issue involved "[a] confusing chronology of litigation." *Evans*, 167 F.3d at 1106; App. 1a. Plaintiff in her Complaint alleged that Lederle sold a DPT vaccine to Link Clinic in Coles County, Illinois (Plaintiff's Complaint, ¶ 7), and that Dr. Sharma administered the vaccine to Jessica Evans at the Link Clinic in Coles County, Illinois on several occasions in 1978 (Plaintiff's Complaint, ¶ 8). Plaintiff further alleged that, as a result of the administration of those vaccines, she experienced a reaction to the pertussis component of the vaccine resulting in injury (Plaintiff's Complaint, ¶ 11).

Plaintiff originally filed her lawsuit for bodily injuries in the Circuit Court of Cook County, naming the Sarah Bush Lincoln Health Center, Dr. Ramesh Patel, the Link Clinic and Dr. O. Sharma as defendants. That complaint

was filed on August 14, 1985. The case was subsequently transferred to Coles County, Illinois. Petitioner voluntarily dismissed the state court complaint on July 14, 1988.

Petitioner commenced two other proceedings before the instant action was filed. In her complaint, petitioner describes those two other actions as follows:

> That on or about June 20, 1988 Plaintiff filed with the Court cause No. 88-3191 in which LEDERLE was a named defendant and that thereafter on August 24, 1990 Plaintiff filed a "Motion to Dismiss Without Prejudice So as to Allow Proceeding Under the National Vaccine Injury Compensation Act," which Motion was granted by the Court on August 28, 1990 whereupon on October 1, 1990 Plaintiff filed a Petition under the Act (No. 90-2265V) upon which there was no decision on the merits and which Petition was voluntarily dismissed by order of Special Master Millman of the U.S. Claims Court on January 31, 1995 whereupon on February 28, 1995 Plaintiff filed her election to proceed to suit.

(Plaintiff's Complaint, ¶ 3).

On February 28, 1995, plaintiff filed this action—the fourth action seeking damages for bodily injuries—in the United States District Court for the Central District of Illinois. In this action, plaintiff sued the Link Clinic, Dr. O. Sharma and Lederle. On May 10, 1995, Link Clinic and Dr. O. Sharma filed a motion to dismiss plaintiff's complaint, invoking the one-refiling rule contained in the savings statute. 735 ILCS 5/13-217. That motion was granted by the District Court by written order dated

October 31, 1995. *Evans v. Lederle*, 904 F. Supp. 857 (C.D. Ill. 1995). The grounds upon which the motion was made, and upon which it was ultimately granted, were that plaintiff violated section 13-217 of the Illinois Code of Civil Procedure (735 ILCS 5/13-217) when she refiled her action twice after it had been voluntarily dismissed.

Lederle thereafter filed a motion for judgment on the pleadings on the grounds that the "one refiling" rule of 735 ILCS 5/13-217 barred plaintiff's present lawsuit. Lederle's motion was granted by District Judge Mihm by written order dated January 28, 1998 (App. 18a-26a). Plaintiff timely filed a Notice of Appeal.

The Court of Appeals for the Seventh Circuit affirmed, in an opinion that was unanimous. Petitioner's petition for rehearing was denied. All of the judges on the original panel voted to deny rehearing. App. 31a. Petitioner made no suggestion for rehearing en banc to the Court of Appeals.

REASONS FOR DENYING THE WRIT

I. PETITIONER HAS FAILED TO ARTICULATE COMPELLING REASONS FOR GRANTING THE WRIT.

This Court should deny the Petition for Writ of Certiorari. Supreme Court Rule 10(a) provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10(a) also indicates the "character of reasons," which this Court considers in deciding whether to grant a petition for writ of certiorari. Petitioner fails to identify any of the reasons delineated in Supreme Court Rule 10(a) for granting a petition for writ of certiorari.

The petition does not demonstrate that the Court of Appeals has issued a decision in conflict with the decision of another United States Court of Appeals on the same important matter. The only decision cited by plaintiff in her petition that addresses the Vaccine Act, *Wells v. Secretary of the Department of Health and Human Services*, 28 Fed. Cl. 647 (1993), does not involve the issue of preemption. Indeed, the decision of the Court of Appeals is consistent with statements from decisions of other appellate courts, which petitioner does not cite. *See, e.g., Hurley v. Lederle Laboratories*, 863 F.2d 1173 (5th Cir. 1988) (referencing Vaccine Act in ruling that other federal statutes do not preempt state law in vaccine-injury lawsuits).

Nor does petitioner argue that the Court of Appeals has issued a decision that conflicts with a state court of last resort on the question presented. Indeed, on the state law issue that ultimately provided the rule of decision below, the decision of the Court of Appeals was consistent with every Illinois Supreme Court precedent on the subject. *Timberlake v. Illini Hosp.*, 175 Ill. 2d 159, 676 N.E.2d 634 (1997); *Flesner v. Youngs Development Co.*, 145 Ill. 2d 252, 582 N.E.2d 720 (Ill. 1991); *Gibellina v. Handley*, 127 Ill. 2d 122, 535 N.E.2d 858 (Ill. 1989); *Gendek v. Jehangir*, 119 Ill. 2d 338, 518 N.E.2d 1051 (1988). *See also Koffski v. Village of North Barrington*, 988 F.2d 41 (7th Cir. 1993) (applying Illinois law). Petitioner has not challenged this consistent line of state court precedent.

Petitioner also has failed to demonstrate that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of

this Court's supervisory powers. Supreme Court Rule 10(a). Indeed, it is hard to imagine an issue less likely to recur. This appeal arises from a case with a "confusing chronology of litigation." *Evans*, 167 F.3d at 1106; App. 1a. Petitioner belongs to the oldest category of possible claimants under the Vaccine Act. Because claimants who filed actions after the effective date of the Vaccine Act were required to seek compensation under the Vaccine Act before resorting to a civil action—unlike petitioner here—the issue before this Court should not be encountered by those claimants.

Finally, the petition does not demonstrate that the Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Supreme Court Rule 10(a). Indeed, this Court has not addressed the preemptive scope of the Vaccine Act. Instead, the petitioner urges as a basis for certiorari review merely that the decision of the Court of Appeals contravenes the express provisions of the Vaccine Act (Petition, at 9), as well as the purposes for which the Vaccine Act was created (Petition, at 14). Petitioner, in essence, argues merely that the Court of Appeals erred. Supreme Court Rule 10 makes clear that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Thus, should this Court credit petitioner's assignments of error, which it should not, they are patently insufficient to justify this Court's discretionary exercise of review on writ of certiorari.

II. THE DECISION BELOW CORRECTLY INTERPRETS THE PREEMPTIVE SCOPE OF THE VACCINE ACT.

Petitioner's argument fails to identify whether her preemption argument is predicated upon principles of express or implied preemption. By referencing the "plain language" of the Vaccine Act, petitioner presumably invokes the doctrine of express preemption. Although reiterating established principles of statutory construction, which are not disputed, petitioner misapplies those principles to the Vaccine Act.

Significantly, petitioner's argument ignores that portion of the Vaccine Act providing as follows: "State law shall apply to a civil action brought for damages for a vaccine related injury or death." 42 U.S.C. 300aa-22(a). This provision, or "statutory caveat," as it was called by the Court of Appeals, *Evans*, 167 F.3d at 1112; App. 14a, was clearly designed to express Congress's intention that "the commencement or resumption of civil proceedings—as well as their substantive determination—is a matter for state law." *Evans*, 167 F.3d at 1112; App. 14a, *citing* 42 U.S.C. §§ 300aa-21(c) & 300aa-22(a). As the Court of Appeals below correctly determined, "there is no reason to believe that in deciding not to preempt state statutes of limitation Congress intended to make an exception for plaintiffs who had civil actions pending when the Act came into effect." *Evans*, 167 F.3d at 1112; App. 14a. Petitioner's argument renders the above-cited provision meaningless, and therefore violates the very principles of statutory construction espoused in the cases she cites. (Petition, at 9-10, *citing United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *Wells v. Secretary of Department of Health and Human Services*, 28 Fed. Cl.

647, 660 (1993), *quoting Boise Cascade Corp. v. EPA*, 942 F.2d 1427 (9th Cir. 1991)).

Moreover, the decision of the Court of Appeals is consistent with the unequivocal legislative history of the Vaccine Act. Title 42 U.S.C. § 300aa-22(e) provides as follows:

> No state may establish or enforce a law which prohibits an individual from bringing a civil action against a vaccine manufacturer for damages for a vaccine-related injury or death if such civil action is not barred by this Court.

42 U.S.C. § 300aa-22(e). A House Report that is a part of the Vaccine Act's legislative history explains this provision as follows:

> State statutes that effectively foreclose individuals from bringing civil actions for vaccine-related injuries or death or [sic] preempted by this subsection. The committee intends this preemption to apply even where a state has established a compensation system as an alternative to filing a civil action. It does not intend, however, to grant statutes of limitations or the provisions of state law in practice that regulate the time or manner in which civil actions in general may be brought or maintained . . .

H.R. Rep. No. 99-908, at 27 (1986), U.S. Code Cong. & Admin. News 1986 at 6344, 6368. There are no contrary statements in the legislative history, and, as the Court of Appeals noted, "Evans did not address this legislative history." *Evans*, 167 F.3d at 1111 n.6; App. 11(a). Indeed, in this Court, petitioner offers no contrary construction of the legislative history. As the Court of Appeals cor-

rectly noted, "[i]t is hard to imagine legislative history that speaks more directly to the issue . . . ." *Evans*, 167 F.3d at 1111; App. 11a.

Ultimately, petitioner's argument fails, because it undermines one of the important purposes of the Vaccine Act. As the Court of Appeals noted correctly below, one of the principal purposes of the Vaccine Act is "to free manufacturers from the specter of large, uncertain, tort liability, and thereby keep vaccine prices fairly low and keep manufacturers in the market." *Evans*, 167 F.3d at 1111; App. 10a *citing Schafer v. American Cyanamid Co.*, 20 F.3d 1, 4 (1st Cir. 1994) (*citing* legislative history). Thus, petitioner's argument, which ignores this important purpose of the statute, violates the very principles of statutory construction referenced in the cases she cited.

III. THE DECISION BELOW CORRECTLY REJECTED PETITIONER'S IMPLIED CONFLICT PREEMPTION ARGUMENT.

Petitioner argues that the writ of *certiorari* should be granted because the decision below stands as an obstacle "to the accomplishment and execution of the full purposes and objectives of Congress." (Petitioner's Brief, at 14, *citing Felder v. Casey*, 487 U.S. 131, 138 (1988)). Petitioner, in effect, argues that the Vaccine Act preempts the Illinois savings statute under the doctrine of implied conflict preemption. Petitioner's argument fails for much the same reason that her express preemption argument fails. Petitioner ignores an important purpose of the Vaccine Act.

The Court of Appeals correctly analyzed the implied conflict preemption issue in its decision below. In this regard, the Court of Appeals ruled as follows:

> Indeed, common sense suggests that if state statutes of limitation were preempted—and not replaced by federally prescribed limitations—vaccine-injured plaintiffs would have extraordinary freedom to commence lawsuits at a time and in a manner of their own choosing. This result would be contrary to an important federal purpose underlying the Act, namely, "to free manufacturers from the specter of large, uncertain tort liability, and thereby keep vaccine prices fairly low and keep manufacturers in the market." Schafer, 20 F.3d at 4 (citing legislative history); see also Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 565, 110 S. Ct. 2121, 109 L. Ed. 2d 588 (1990) ("strict language . . . does not control, even if the statutory language has a plain meaning, if the application of that language will produce a result demonstrably at odds with the intention of its drafters") (internal quotations and citation omitted).

Evans, 167 F.3d at 1111; App. 10a. Nothing in the Vaccine Act suggests that Congress intended that there would be open-ended liability for vaccine manufacturers, and such a result would undermine the Vaccine Act's purpose of making vaccines available by freeing manufacturers from the specter of uncertain liability.

Petitioner's reference to *Felder v. Casey*, 487 U.S. 131 (1988), undermines her argument. In *Felder*, this Court echoed the very sentiments expressed by the Court of Appeals in this case concerning the threat of open-ended liability created thereby. This court discussed the differ-

ence between the notice of claim provisions at issue in *Felder* and state statutes of limitation, stating as follows:

> . . . Courts have reasoned that, unlike the lack of statutes of limitation . . ., the absence of any notice-of-claim provision is not a deficiency requiring the importation of such statutes . . . Because statutes of limitations are among the universally familiar aspects of litigation considered indispensable to any scheme of justice, it is entirely reasonable to assume that Congress did not intend to create a right enforceable in perpetuity.

487 U.S. at 140. This Court recognized in *Felder* both that statutes of limitations are "universally familiar aspects" of litigation and that Congress could sensibly decide not to create rights "enforceable in perpetuity." Petitioner's effort to create a perpetual right to sue vaccine manufacturers under the circumstances of this case should be rejected. Thus, the very case on which petitioner predicates her implied preemption argument fails to provide support.

CONCLUSION

Petitioner has failed to articulate any of the character of reasons justifying the granting of a petition for writ of certiorari. The decision of the Court of Appeals below does not conflict on the question presented with the decisions of any other Court of Appeals. To the extent the decision below is predicated on state law, it is consistent with a long line of Illinois Supreme Court precedent. The issue raised here is unlikely to recur given the convoluted procedural posture of the case. Most important, the de-

cision of the Court of Appeals properly effectuated the intent of Congress in enacting the Vaccine Act.

WHEREFORE, for the foregoing reasons, the respondent, Lederle Laboratories, respectfully requests that this Court deny petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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